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No.

In The

Supreme Court of the United States

October Term, 1995

FRANKLIN E. SKEPTON,

Petitioner,

vs.

ROBERT REICH, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the doctrine of vicarious liability extends to individuals in contempt of court proceedings under 18 U.S.C. § 401?

II. Whether the Petitioner, an adult individual, can be found vicariously liable for contempt of court, where: (a) he had no notice of the order of court at issue; and (b) the alleged contemptuous conduct was committed by a third party, who was not found in contempt?

LIST OF PARTIES

Robert Reich, Secretary of Labor, United States Department of Labor.

Franklin E. Skepton, and his successors.

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Third Circuit.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of Case	3
Reasons for Granting the Writ	6
I. The doctrine of vicarious liability should not apply to individuals in contempt proceedings where: (1) the alleged contemptuous conduct was committed by a third party who was not found in contempt; and (2) where there is no notice of the Court Order at issue.	6
IIa. Franklin E. Skepton was not given notice under the Fifth and Fourteenth Amendments to the United States Constitution.	7
IIb. Franklin E. Skepton has himself done nothing by way of any act or omission to violate or disobey the inspection warrant.	9

Contents

Page

III. The Occupational Safety and Health Administration cannot force a citizen to verbally express his "consent" to an OSHA inspection conducted pursuant to an inspection warrant. . . 9

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2nd Cir. 1930) 7

Backo v. Local 281, United Bhd. of Carpenters and Joiners, 438 F.2d 176 (2nd Cir. 1970), *cert. denied*, 404 U.S. 858, 92 S. Ct. 110 (1971) 6

Farber v. Rizzo, 363 F. Supp. 386 (D.C. Pa. 1973) 8

Hoover v. Wagner, 47 F.3d 845 (7th Cir. 1995) 7

In Re Public Service Co. of New Hampshire, 848 F. Supp. 318 (D.R.I. 1994), *aff'd*, 43 F.3d 763 (1994), *cert. denied*, __U.S. __, 115 S. Ct. 1959 (1995) 7

Kaczmarczyk v. I.N.S., 933 F.2d 588 (7th Cir. 1991) ... 8

Lieb v. American PAC. International, Inc., 489 F. Supp. 960 (D.C. Pa. 1980) 8

N.L.R.B. v. Maine Caterers, Inc., 732 F.2d 689 (1st Cir. 1984) 6

Contents

	Page
N.L.R.B. v. Sequoia Dist. Council of Carpenters, 568 F.2d 628 (9th Cir. 1977)	6
Pettibone v. U.S., Idaho, 148 U.S. 197, 13 S. Ct. 542 (1893)	7
Propert v. District of Columbia, 948 F.2d 1327 (D.C. Cir. 1991)	8
Roe v. Operation Rescue, 54 F.3d 133 (3rd Cir. 1995)	7
Securities and Exchange Commission v. Coffey, 493 F.2d 1304 (6th Cir. 1974), *cert. denied*, 420 U.S. 908, 95 S. Ct. 826 (1975)	6
Thompson v. Johnson, 410 F. Supp. (D.C. Pa. 1976), *aff'd*, 566 F.2d 568 (1976)	8
United States v. Laurins, 857 F.2d 529 (9th Cir. 1988)	6
United States v. Taystee Baking Co., 55 F. Supp. 490 (D.C. Tex. 1944)	7
United States v. Wilson, 221 U.S. 361, 31 S. Ct. 538 (1911)	6

Statutes Cited:

18 U.S.C. § 401	i, 3, 6, 9, 10
18 U.S.C.§ 401(3)	3

Contents

Page

28 U.S.C.§ 1254(l) 1

Rule Cited:

Fed. R. Civ. P. 65(d) 6

Other Authority Cited:

29 C.F.R. § 1903.4 3

APPENDIX

Appendix A — Judgment Order of the United States Court of Appeals for the Third Circuit Dated October 24, 1995 ..... 1a

Appendix B — Bench Memorandum of United States District Court for the Eastern District of Pennsylvania Filed February 28, 1995 ..... 3a

Appendix C — Civil Contempt Order of the United States District Court for the Eastern District of Pennsylvania Dated February 24, 1995 ..... 7a

Appendix D — Order of the United States District Court for the Eastern District of Pennsylvania Dated February 24, 1995 ..... 10a

Franklin E. Skepton, the Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on October 31, 1995.

OPINIONS BELOW

A. The October 31, 1995 judgment order of the Court of Appeals, whose judgment is herein sought to be reviewed, is identified as Case No. 95-1217, is unpublished and is reprinted in the Appendix to this Petition, p. 1a.

B. The February 24, 1995 opinion of the United States District Court for the Eastern District of Pennsylvania, was docketed February 28, 1995, identified as Case No. 95-0932, and is reprinted in the Appendix to this Petition, p. 3a.

STATEMENT OF JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on October 31, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same

> offense to be twice put in jeopardy of life or limb; nor shall be compelled at any criminal case to be a witness against themselves, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment of the United States Constitution, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

18 U.S.C. § 401:

> **A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —**
>
> **(1) Misbehaviour of any person in its presence or so near thereto as to obstruct the administration of justice; (2) misbehaviour of any of its officers in their official transactions; (3) disobedience or resistance to its lawful writ, process, order, rule, decree or command.**

STATEMENT OF THE CASE

This case arose from an inspection warrant issued by a United States Magistrate Judge on January 13, 1995, pursuant to 29 C.F.R. § 1903.4, following the presentation of a Petition filed by the Secretary of Labor in an *ex parte* proceeding, to inspect a construction project in Bethlehem, Pennsylvania. *See* 18 U.S.C. § 401(3).

The Petitioner, Franklin E. Skepton, is a general contractor, who operates as a sole proprietor. On January 17, 1995, the Secretary arranged for service of the inspection warrant on an employee of the Petitioner, one Paul G. Skepton.

On January 17, 1995, at approximately 8:00 a.m., George R. Boyd, a safety compliance officer for OSHA, appeared at the job site and served an inspection warrant on Paul G. Skepton.

No service was effected upon the Petitioner, Franklin E. Skepton by fax, hand delivery or otherwise, and the Petitioner did

not learn of the existence, issuance and service of the inspection warrant, until *after* the events forming the basis for the contempt petition had already occurred.

Upon receipt of the inspection warrant, Paul G. Skepton informed the OSHA representative that he had to call the company office but was unable to reach the owner of the company, Franklin E. Skepton.

The OSHA safety compliance officer, George R. Boyd, and his assistant, remained on the job site from approximately 7:50 a.m. to approximately 9:20 a.m. During this time period, OSHA personnel walked through the construction site, and their ability to observe work conditions was unrestricted.

There is a dispute as to whether Paul G. Skepton informed Boyd that an inspection was not going to be permitted. The position of Paul G. Skepton is that he had no authority to either authorize an inspection or refuse an inspection, and therefore did not commit himself either way.

Franklin E. Skepton was not at the job site at the time of the visit by George R. Boyd and the representatives of OSHA. Franklin E. Skepton was at home at the time of the visit by the OSHA inspectors and did not learn of the existence of and the service of the inspection warrant at the job site until approximately 3:30 to 3:45 p.m. on the afternoon of January 17, 1995. At no time either on January 17, 1995, or up to the present, has Franklin E. Skepton done anything to prevent any inspections from being conducted by OSHA representatives on the subject job site.

Following the service of the inspection warrant on Paul G. Skepton on the morning of January 17, 1995, the Secretary of Labor thereafter filed a Petition for Adjudication of Civil

Contempt. Instead of naming Paul G. Skepton *and* Franklin E. Skepton as the respondents in the Petition for Contempt, the Secretary named Franklin E. Skepton, *only,* as the respondent.

Paul G. Skepton, the actor who allegedly committed the contemptuous conduct, has to this day never been cited for contempt.

Franklin E. Skepton had no knowledge of either the existence or the service of the inspection warrant until after any alleged violation of the inspection warrant allegedly occurred. He was found to be in contempt of an order of which he had no knowledge.

Franklin E. Skepton did nothing to violate the inspection warrant, including but not limited to, issuing instructions, either express or implied, to any of his employees to violate the inspection warrant. Any violation that may have occurred constituted the unauthorized actions of an employee and not Franklin E. Skepton. Franklin E. Skepton has done nothing to dishonor or refuse the inspection warrant issued in this case.

Following a hearing held before the District Court on February 24, 1995, the court entered an Order finding Franklin E. Skepton in civil contempt. The Order directed Franklin E. Skepton to comply with the inspection warrant, imposed a fine of $4,189.30 and imposed an ongoing obligation to comply with the warrant, upon failure of which there would be a fine of $5,000 per day and the threat of a jail sentence. The Third Circuit affirmed the District Court's judgment.

REASONS FOR GRANTING THE WRIT

I.

THE DOCTRINE OF VICARIOUS LIABILITY SHOULD NOT APPLY TO INDIVIDUALS IN CONTEMPT PROCEEDINGS WHERE: (1) THE ALLEGED CONTEMPTUOUS CONDUCT WAS COMMITTED BY A THIRD PARTY WHO WAS NOT FOUND IN CONTEMPT; AND (2) WHERE THERE IS NO NOTICE OF THE COURT ORDER AT ISSUE.

The doctrine of vicarious liability extends to contempt of court proceedings under 18 U.S.C. § 401 only under certain circumstances.

A Court Order binds parties and those in active concert with parties who have actual notice of the Order. Fed. R. Civ. P. 65(d). A non-party may be held liable for contempt if he either abets or is legally identified with the named defendant, but those not legally identified must have actual knowledge of the Order to be bound. *United States v. Laurins*, 857 F.2d 529, 535 (9th Cir. 1988); *N.L.R.B. v. Sequoia Dist. Council of Carpenters*, 568 F.2d 628, 633 (9th Cir. 1977).

Although an Order to a corporation may bind those who are legally responsible, *N.L.R.B. v. Maine Caterers, Inc.*, 732 F.2d 689, 691 (1st Cir. 1984); *see United States v. Wilson*, 221 U.S. 361, 376, 31 S. Ct. 538, 542-43 (1911), Franklin E. Skepton is a sole proprietor. Therefore, the knowledge of Paul G. Skepton cannot be imputed to the Petitioner. *See Securities and Exchange Commission v. Coffey*, 493 F.2d 1304, 1310 (6th Cir. 1974), *cert. denied*, 420 U.S. 908, 95 S. Ct. 826 (1975); *Backo v. Local 281, United Bhd. of Carpenters and Joiners*, 438 F.2d 176, 180 (2nd Cir. 1970), *cert. denied*, 404 U.S. 858, 92 S. Ct. 110 (1971).

As Judge Learned Hand said in *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2nd Cir. 1930):

> A person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt. This is well settled law.

Franklin E. Skepton neither knowingly nor unwittingly assisted Paul Skepton in violating the court's Order. Yet he is named as the defendant in the Contempt Order.

An employer may not be found guilty of contempt for the act of his employee whose act he neither authorized, consented to, nor ratified. *United States v. Taystee Baking Co.*, 55 F. Supp. 490 (D.C. Tex. 1944); *see In Re Public Service Co. of New Hampshire*, 848 F. Supp. 318 (D.R.I. 1994), *aff'd*, 43 F.3d 763 (1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1959 (1995) (pertinent inquiry is whether non-party knowingly played material role); *see also, Roe v. Operation Rescue*, 54 F.3d 133 (3rd Cir. 1995) (where leader of anti-abortion organization solicited support for campaign, acting in concert with the organization); *Hoover v. Wagner*, 47 F.3d 845 (7th Cir. 1995) (requirement of purpose and effect of assisting party).

II(a).

FRANKLIN E. SKEPTON WAS NOT GIVEN NOTICE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In matters of contempt, persons are not held liable unless they know or have notice. Without service of process or knowledge or notice, a violation cannot be made out. *Pettibone v. U.S., Idaho*, 148 U.S. 197, 13 S. Ct. 542 (1893).

A person is liable for civil contempt only if he violates a Court Order with actual notice that the Order has been issued. *Thompson v. Johnson*, 410 F. Supp. (D.C. Pa. 1976), *aff'd*, 566 F.2d 568 (1976); *Farber v. Rizzo*, 363 F. Supp. 386 (D.C. Pa. 1973).

One of the primary elements of due process is notice. *Lieb v. American PAC. International, Inc.*, 489 F. Supp. 960 (D.C. Pa. 1980). The due process clause requires, at a minimum, that the government provide notice and some kind of hearing before deprivation of a property interest. The notice provided must be reasonably certain to inform those affected. *Propert v. District of Columbia*, 948 F.2d 1327 (D.C. Cir. 1991). The essence of the due process clause is the requirement that the person in jeopardy of serious loss be given notice of the case against him, and the opportunity to meet it. *Kaczmarczyk v. I.N.S.*, 933 F.2d 588 (7th Cir. 1991).

Franklin E. Skepton, operating as a sole proprietor, cannot be found to have been in contempt of an Order of which he had no knowledge. The record is devoid of any evidence of notice to Franklin E. Skepton of the existence, issuance and service of an inspection warrant. The inspection warrant was served on a non-owner of the company, who although an employee of the company, was not the project manager on this particular construction site. The case law requires proof of actual notice, not implied or constructive notice.

OSHA made no effort to contemporaneously serve Franklin E. Skepton with a copy of the warrant either by personal service, by fax, by mail, by e-mail, by mailgram, by telegram or even through verbal telephone notice of the existence, issuance and service of the warrant. There was no service of the warrant on Skepton's attorney.

Notice is one of the most basic requirements of due process under the Fifth and Fourteenth Amendments to the United States Constitution. In this case, these requirements have not been met.

II(b).

FRANKLIN E. SKEPTON HAS HIMSELF DONE NOTHING BY WAY OF ANY ACT OR OMISSION TO VIOLATE OR DISOBEY THE INSPECTION WARRANT.

The record is devoid of any evidence concerning any action or omission by Franklin E. Skepton concerning noncompliance by him as an individual with the subject inspection warrant. As stated above, he did not even know of its existence until after the alleged violation took place. Franklin E. Skepton gave no instructions to his employees regarding compliance with the warrant. If anyone refused the inspection, it was Paul G. Skepton.

Any actions or omissions undertaken by Paul G. Skepton were taken without the knowledge or approval of Franklin E. Skepton, and therefore cannot be attributed to him.

III.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION CANNOT FORCE A CITIZEN TO VERBALLY EXPRESS HIS "CONSENT" TO AN OSHA INSPECTION CONDUCTED PURSUANT TO AN INSPECTION WARRANT.

Matthew J. Reider, Regional Counsel for the Occupational Safety and Health Administration of the United States Department of Labor testified that the only way for a citizen to avoid a contempt petition is to state their assent or agreement to an inspection warrant. The mere protest and/or objection is considered defiance of the court and in violation of 18 U.S.C.

§ 401. This type of action violates the citizen's First Amendment rights and should be prohibited.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 24, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1217

ROBERT REICH, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

v.

FRANKLIN E. SKEPTON, and his successors,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 95-cv-00932)
District Judge: Honorable Franklin S. VanAntwerpen

Submitted Under Third Circuit LAR 34.1(a)
Tuesday, October 24, 1995

BEFORE: SLOVITER, *Chief Judge,*
COWEN and GARTH, *Circuit Judges*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, Franklin E. Skepton and his successors, it is

ADJUDGED AND ORDERED that the judgment of the

Appendix A

district court dated February 24, 1995 and docketed February 28, 1995 be and the same is hereby affirmed.

Costs taxed against appellant.

By the Court,

s/ Sloviter
Circuit Judge

ATTEST:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

APPENDIX B — BENCH MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED FEBRUARY 28, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 95-0932

ROBERT REICH, Secretary of Labor, United States Department of Labor,

Complainant,

v.

FRANKLIN E. SKEPTON, and his successors,

Respondent.

In the Matter of

Worksite Inspection of Franklin E. Skepton, a worksite consisting of the construction of an addition and alteration of Nitschman Middle School located at 909 West Union Boulevard, Bethlehem, Lehigh County, Pennsylvania

BENCH MEMORANDUM

VAN ANTWERPEN, J FEBRUARY 24, 1995

Plaintiff Robert Reich, Secretary of Labor, United States Department of Labor, has filed a written petition for

adjudication of civil contempt pursuant to 18 U.S.C. § 401(3). Defendant Franklin E. Skepton is a sole proprietor who is currently engaged in school construction at the Nitschman Middle School, 909 West Union Boulevard, Bethlehem, Lehigh County, Pennsylvania. We issued a Rule to Show Cause, and after proper notice and service of the Rule, a full court hearing was held on February 24, 1995.

We find the following facts by clear and convincing evidence:

(1) In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21, 98 S. Ct. 1816, 1824-25 (1978), the Supreme Court upheld administrative searches based upon a general administrative plan. On the basis of such a plan, the University of Tennessee scheduled the local Occupational Safety and Health Administration (OSHA) office for a "programed" inspection of defendant's jobsite at the Nitschman Middle School.

(2) Because defendant has a long history of vocal criticism of OSHA policies and practices and has previously resisted safety inspections at his jobsites, the local OSHA office applied for and properly obtained a valid anticipatory inspection warrant from United States Magistrate Judge Arnold Rapoport on January 13, 1995. This warrant conformed to 29 C.F.R. § 1903.4(b). Plaintiff had previously obtained a warrant and served it on Mr. Paul Skepton at the jobsite on January 13, 1995, however, Paul Skepton refused to let the inspectors enter because the warrant referred to the wrong county and because he claimed the warrant was "too broad."

(3) The corrected warrant was served upon defendant's

job foreman, Paul Skepton, on January 17, 1995 at about 8:00 a.m. At that time, Paul Skepton was giving orders on the job, had a key to the construction trailer, had voiced objections to the prior warrant, and was admitted by defendant's testimony to be the foreman on the job. He had apparent authority to receive service of the warrant and was properly served with said warrant.

(4) Notwithstanding proper service of the warrant, Paul Skepton willfully refused to comply with said warrant, and told plaintiff's inspectors that they would not be permitted to conduct an inspection.

(5) The said Paul Skepton is an agent and employee of defendant, and said willful refusal by him is a refusal on the part of the defendant.

(6) The jobsite in question is an active school site, and danger may be present to construction workers and school children.

(7) Because of the willful refusal of his employee to obey lawful process, defendant is in contempt of this court. Since our goal is to compel compliance with lawful process, we will find defendant in civil contempt.

(8) Upon motion of the Government, we will impose a fine of $4,189.00 to be paid within 30 days of February 24, 1995 to make the Government whole for its costs. We will also impose an additional fine of $5,000.00 per day for each day our contempt order is not complied with. Since safety to others is at issue, we will also reserve the option to impose a jail sentence if necessary. This bench memorandum is made a part of our civil contempt order issued this same day.

Appendix B

BY THE COURT

s/ Franklin S. Van Antwerpen
United States District Judge

APPENDIX C — CIVIL CONTEMPT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED FEBRUARY 24, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 95-0932

ROBERT REICH, Secretary of Labor, United States Department of Labor,

Complainant,

v.

FRANKLIN E. SKEPTON, and his successors,

Respondent.

In the Matter of

Worksite Inspection of Franklin E. Skepton, a worksite consisting of the construction of an addition and alteration of Nitschman Middle School located at 909 West Union Boulevard, Bethlehem, Lehigh County, Pennsylvania

CIVIL CONTEMPT ORDER

AND NOW, this 24th day of February, 1995, it is hereby ORDERED as follows:

Appendix C

1. Neither defendant Franklin E. Skepton nor his agents, employees, or foremen shall in any way unlawfully harass or assault or use force or threat thereof to prevent plaintiff or plaintiff's agents or inspectors from inspecting the jobsite at the Nitschman Middle School, 909 West Union Boulevard, Bethlehem, Lehigh County, Pennsylvania, nor shall said defendant, his agents, employees or foremen refuse admission or state or otherwise inform said plaintiff or plaintiff's agents or inspectors that they may not conduct such lawful inspections.

2. Defendant shall authorize and direct its job foremen, or some other employee in the absence of the foreman, to accept service of warrants of this court and its magistrate judges so that inspections can be conducted, and defendant and his agents, employees, and foremen shall obey and properly respond to and comply with all lawful warrants, subpoenas, and other lawful process of this court and its magistrate judges.

3. Defendant shall inform his agents, employees, and foremen of this order, and shall adopt a policy requiring them to comply fully with this order and all administrative warrants or suffer disciplinary action.

4. So long as defendant pays his fine within 30 days of the date of this order and complies and continues to comply with this order, this court will not impose further sanctions. If defendant's agents, employees, or foremen fail to comply with this order, this court will impose a fine of $5000.00 per day for each day of non-compliance. If defendant Franklin E. Skepton individually violates this order, this court will impose a similar fine or a jail sentence, which jail sentence will terminate upon his personal compliance with this order.

Appendix C

5. Upon request by plaintiff, the United States Marshalls shall assist in enforcing this order and may take such actions as are necessary to do so.

6. Our bench memorandum of February 24, 1995 is incorporated herein, and the findings therein are made a part of this order. This case is closed. Nevertheless, the court will retain jurisdiction over this matter for enforcement purposes.

BY THE COURT

s/ Franklin S. Van Antwerpen
Franklin S. Van Antwerpen
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED FEBRUARY 24, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

FILE No. 95-932

MAGISTRATE 95-40M

ROBERT REICH, Secretary of Labor, United States Department of Labor,

Complainant,

v.

FRANKLIN E. SKEPTON, and his successors,

Respondent.

In the Matter of

Worksite Inspection of Franklin E. Skepton, a worksite consisting of the construction of an addition and alteration of Nitschman Middle School located at 909 West Union Boulevard, Bethlehem, Lehigh County, Pennsylvania

ORDER

And now this 24th day of February, 1995 upon motion of the Complainant and for good cause shown, a fine of

Appendix D

$4,189.30 is hereby entered against defendants and for plaintiffs, to compensate plaintiffs for the costs incurred for its Petition for Adjudication of Contempt.

s/ Franklin S. Van Antwerpen
Franklin S. Van Antwerpen
UNITED STATES DISTRICT JUDGE

[stamped]
A TRUE COPY CERTIFIED TO FROM THE RECORD
DATED: 2/24/95
ATTEST: s/ illegible
DEPUTY CLERK, UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA